A **EVEREST POINT SDN BHD & ANOR v. LIM PECK SIM & ORS**

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASAN LAH FCJ
B RAMLY ALI FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEAL NO: 02(f)-33-04-2015(W)]
24 MAY 2017

C ***CONTRACT:*** *Building contract – Sale and purchase agreement – Delay in completion – Damages – Liquidated ascertained damages ('LAD') – Cut-off date for calculation of LAD – Whether on date purchaser notified of issuance of Certificate of Fitness for Occupation – Whether on date when purchaser took actual possession of apartment unit*

D ***LAND LAW:*** *Housing developers – Delay in completion – Damages for late delivery – Liquidated ascertained damages ('LAD') – Time when vacant possession deemed delivered – Cut-off date for computation of LAD – Whether on date purchaser notified of issuance of Certificate of Fitness for Occupation – Whether on date when purchaser took actual possession of apartment unit*

E The plaintiffs (respondents) were joint purchasers of an apartment unit ('unit') in a housing project developed by the first defendant (first appellant). The sale and purchase agreement ('SPA') as executed between the parties, *inter alia*, stipulated that the first defendant would complete and deliver the unit to the plaintiffs within 36 months from the date of the SPA (on or before F 28 June 2008), failing which liquidated ascertained damages ('LAD') would be payable to the plaintiffs. The first defendant failed to deliver vacant possession within the stipulated period, and the plaintiffs, hence, filed a claim for LAD against the first defendant for the delay. It was the plaintiffs' case that since they only took actual possession of the unit on 20 September G 2016, the first defendant was therefore liable to pay LAD from 28 June 2008 to 20 September 2016. The facts as adduced before the High Court, however, showed that the first defendant had sought to deliver vacant possession of the unit as early as 2010, when it issued a notice of delivery of vacant possession dated 16 November 2010. This notice, however, was not supported by a H letter of confirmation from the relevant appropriate authority as required by cl. 25.2 of the SPA, and was thus invalid. Be that as it may, following the issuance of the certificate of fitness for occupation ('CFO') by the appropriate authority on 25 May 2011, the first defendant had, on 30 May 2011, again notified the plaintiffs that the CFO had been issued and that it was ready to I deliver vacant possession, and further that the plaintiffs ought to tender the balance purchase price and other monies due in respect of the unit. The

plaintiffs did not accede to the requests, and in any case had indicated an intention to take possession only on 16 April 2014, and taken the keys to the unit only on 20 September 2016.

The learned High Court Judge, upon the obtaining fact ruled that vacant possession was deemed to have been delivered on 30 May 2011, the date the plaintiffs were notified of the issuance of the CFO, and therefore, allowed the plaintiffs' claim for LAD only from 28 June 2008 to 30 May 2011. The plaintiffs appealed wherefore the Court of Appeal, following *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors,* held that the plaintiffs as purchasers were entitled to continue to claim the LAD until they took possession of their unit. The Court of Appeal, thus, ordered that the cut-off date for the calculation of the LAD was 16 April 2014, being the date the plaintiffs wrote to the first defendant indicating their intention to take possession of the unit, and not 30 May 2011.

The defendants appealed to the Federal Court and the issue that arose was whether, on the facts and in the circumstances of this case, vacant possession was deemed delivered on the date the plaintiffs were notified of the issuance of the CFO for the unit on 30 May 2011, or the date when the plaintiffs took actual possession by taking the keys to the unit on 20 September 2016.

Held (allowing appeal; reinstating decision of High Court)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) The evidence showed that the first defendant as the developer was willing and ready to deliver vacant possession of the unit when the CFO was issued. All the relevant requirements for delivery of vacant possession as stipulated in cl. 25.2 of the SPA were also fulfilled by the first defendant. The plaintiffs on the other hand have failed to perform their part of the SPA by tendering the balance purchase price and other monies due in respect of the unit, which had been clearly notified in the notification dated 30 May 2011. (para 31)

(2) The decision in *Sentul Raya* cannot be applied to the facts of the instant case. The factual matrix in that case is different from the factual matrix of this case. In that case, there was no CFO issued at the time the LAD claim was filed in court as the project in question had not been completed. Thus, the question of the cut-off date for the LAD claim was still open. However, in the instant case, the construction of the unit in question was completed and the CFO was duly issued and the plaintiffs as purchasers were duly informed about the issuance, before the LAD claim was filed in court. (para 33)

(3) When the CFO to the unit was issued and its issuance notified to the plaintiffs, the plaintiffs could no longer resist vacant possession by refusing to fulfil their obligation to make payment of the balance purchase price in the manner as stipulated in the SPA. When the CFO was issued, the unit was certified to be safe for occupation. In the

circumstances, the plaintiffs are not entitled to claim for LAD until the date when they took actual vacant possession of the unit, as that would amount to an inflated claim for LAD and was prejudicial to the first defendant. It would also be an unjust enrichment of the plaintiffs. (para 34)

(4) The first defendant's obligation to deliver vacant possession is governed by cl. 25 of the SPA. The first defendant had done all that needed to be done under the SPA, *ie*, to deliver vacant possession of the unit which was certified to be safe for occupation. The fact that the earlier delivery notice dated 16 November 2010 was invalid did not mean that the first defendant had failed in its obligations under the SPA to deliver vacant possession. (para 35)

(5) By delaying to exercise their right to take delivery of vacant possession, the plaintiffs sought to take advantage of a more attractive benefit set out in the artificial formula for computation of LAD for late delivery of vacant possession. In any case, to allow the plaintiffs to take their own 'sweet time' in taking delivery of vacant possession and enjoy a higher amount of LAD (despite the issuance of CFO being notified to them), is unjustified and unfair to the first defendant as the developer. The first defendant could also be prejudiced and suffer damages for loss and damages to the unit and/or fixtures and fittings if the plaintiffs were allowed to claim LAD for the extended period, which is not good for the housing industry. (paras 37 & 39)

(6) The unit had been completed and was safe for occupation as certified in the CFO issued on 25 May 2011 and notified to the plaintiffs on 30 May 2011. As the earlier date of notification dated 16 September 2010 by the first defendant was invalid, the effective date of delivery of vacant possession was the date when the issuance of the CFO by the appropriate authority was notified to the plaintiffs on 30 May 2011. Therefore, the cut-off date for the calculation of LAD relating to late delivery of vacant possession of the unit was 30 May 2011, as earlier decided by the High Court. (para 40)

Bahasa Malaysia *Headnotes*

Plaintif-plaintif (responden-responden) adalah pembeli bersama sebuah unit pangsapuri ('unit') di projek perumahan yang dibangunkan oleh defendan pertama (perayu pertama). Perjanjian jual beli ('SPA') yang dimeterai oleh pihak-pihak antara lain menetapkan bahawa defendan pertama akan menyiapkan dan menyerahkan unit kepada plaintif-plaintif dalam tempoh 36 bulan dari tarikh SPA (pada atau sebelum 28 Jun 2008), jika tidak ganti rugi jumlah tertentu ('LAD') akan menjadi terbayar kepada plaintif-plaintif. Defendan pertama gagal menyerahkan milikan kosong dalam tempoh yang ditetapkan, dan plaintif-plaintif memulakan tuntutan LAD terhadap defendan pertama atas kelengahan tersebut. Adalah menjadi kes plaintif-plaintif bahawa oleh kerana mereka hanya mengambil milikan kosong

sebenar unit pada 20 September 2016, maka defendan pertama bertanggungan untuk membayar LAD dari 28 Jun 2008 hingga 20 September 2016. Fakta seperti yang dikemukakan di Mahkamah Tinggi bagaimanapun menunjukkan bahawa defendan pertama telah cuba untuk menyerahkan milikan kosong sejak dari 2010 lagi, bilamana ia mengeluarkan notis penyerahan milikan kosong bertarikh 16 November 2010. Bagaimanapun, notis ini tidak disertai dengan surat pengesahan dari pihak berkuasa yang berkenaan seperti yang dikehendaki oleh fasal 25.2 SPA, dan dengan itu adalah tak sah. Apapun, ekoran dari pengeluaran sijil layak menduduki ('CFO') oleh pihak berkuasa yang berkenaan pada 25 Mei 2011, defendan pertama telah, pada 30 Mei 2011, sekali lagi memberitahu plaintif-plaintif bahawa CFO telah dikeluarkan dan ia bersedia untuk menyerahkan milikan kosong, dan lagi, bahawa plaintif-plaintif perlu membayar baki harga belian serta wang-wang lain yang perlu dibayar berkaitan dengan unit. Plaintif-plaintif tidak mengendahkan permintaan ini, dan walau apapun, hanya menyatakan hasrat untuk mengambil milikan pada 16 April 2014 dan mengambil kunci-kunci unit hanya pada 20 September 2016.

Yang Arif Hakim Mahkamah Tinggi, atas fakta yang dikemukakan, memutuskan bahawa milikan kosong dianggap telah diserahkan pada 30 Mei 2011, iaitu pada tarikh plaintif-plaintif diberitahu mengenai pengeluaran CFO, dan kerana itu membenarkan tuntutan plaintif-plaintif untuk LAD hanya dari 28 Jun 2008 hingga 30 Mei 2011. Plaintif-plaintif merayu dan Mahkamah Rayuan, dengan mengikuti kes *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors,* memutuskan bahawa plaintif-plaintif selaku pembeli berhak untuk terus menuntut LAD hingga ke tarikh mereka mengambil milikan kosong unit. Mahkamah Rayuan dengan itu memerintahkan tarikh penggalan bagi pengiraan LAD di sini adalah 16 April 2014, iaitu tarikh plaintif-plaintif menulis kepada defendan pertama menyatakan hasrat mereka untuk mengambil milikan unit, dan bukannya 30 Mei 2011.

Defendan-defendan merayu ke Mahkamah Persekutuan dan isu yang berbangkit adalah sama ada, berdasarkan fakta dan hal keadaan kes di sini, milikan kosong dianggap telah diserahkan pada tarikh plaintif-plaintif diberitahu mengenai pengeluaran CFO bagi unit pada 30 Mei 2011, atau pada tarikh bila plaintif-plaintif mengambil milikan sebenar dengan mengambil kunci-kunci unit pada 20 September 2016.

Diputuskan (membenarkan rayuan; mengekalkan keputusan Mahkamah Tinggi)

Oleh Ramly Ali HMP menyampaikan keputusan mahkamah:

(1) Keterangan menunjukkan bahawa sebagai pemaju, defendan pertama berhasrat dan bersedia untuk menyerahkan milikan kosong unit setelah CFO dikeluarkan. Kesemua keperluan relevan bagi penyerahan milikan kosong seperti yang tercatat di fasal 25.2 SPA telah pun dipenuhi oleh defendan pertama. Plaintif-plaintif sebaliknya gagal melaksanakan

tanggungjawab mereka di bawah SPA dengan membayar baki harga belian dan wang-wang lain yang tertunggak berhubung dengan unit, di mana semua ini telah diberitahu kepada mereka melalui notis bertarikh 30 Mei 2011.

(2) Keputusan kes *Sentul Raya* tidak boleh dipakai kepada fakta kes di sini. Gugusan fakta dalam kes tersebut adalah berbeza dengan gugusan fakta kes di sini. Dalam kes tersebut, tiada CFO dikeluarkan semasa tuntutan LAD difailkan di mahkamah kerana projek berkaitan masih belum disiapkan. Maka soal tarikh penggalan bagi LAD masih merupakan satu isu yang terbuka. Dalam kes semasa, pembinaan unit berkenaan telah pun siap dan CFO baginya telah dikeluarkan, dan plaintif-plaintif selaku pembeli telah diberitahu mengenai pengeluaran CFO tersebut sebelum tuntutan LAD difailkan di mahkamah.

(3) Apabila CFO bagi unit dikeluarkan dan pengeluarannya itu diberitahu kepada plaintif-plaintif, plaintif-plaintif tidak lagi boleh menolak untuk menerima milikan kosong atau enggan memenuhi kewajipan mereka untuk membayar harga belian seperti yang ditetapkan oleh SPA. Apabila CFO sudah dikeluarkan, bermakna unit telah disahkan selamat untuk dihuni. Oleh yang demikian, plaintif-plaintif tidak berhak untuk menuntut LAD hingga ke tarikh mereka mengambil milikan kosong sebenar unit, kerana itu bererti menuntut LAD secara yang berlebihan dan memprejudiskan defendan pertama. Ia juga memperkayakan plaintif-plaintif secara yang tidak adil.

(4) Obligasi defendan pertama untuk menyerah milikan kosong adalah diselia oleh fasal 25 SPA. Defendan pertama telah melakukan segala yang perlu untuk dilakukannya di bawah SPA, iaitu menyerahkan milikan kosong unit yang disahkan selamat untuk diduduki. Fakta bahawa penyerahan awal notis bertarikh 16 November 2010 tak sah tidak bermakna bahawa defendan pertama telah gagal dalam obligasinya untuk menyerahkan milikan kosong di bawah SPA.

(5) Dengan melengahkan hak mereka untuk mengambil milikan kosong, plaintif-plaintif telah cuba untuk mengambil kesempatan ke atas manfaat lebih menarik seperti yang dibentang di formula artifisial bagi pengiraan LAD ekoran penyerahan lewat milikan kosong. Walau apapun, membenarkan plaintif-plaintif mengambil milikan kosong dengan memilih masa 'sesuka hati mereka' sambil menikmati jumlah LAD yang lebih tinggi (walaupun CFO dikeluarkan dan diberitahu kepada mereka) adalah tidak wajar dan tidak adil kepada defendan pertama selaku pemaju. Defendan pertama juga terbuka kepada prejudis dan boleh menanggung kerugian atas kehilangan dan kerosakan unit dan/atau kelengkapan-kelengkapannya jika plaintif-plaintif dibenar menuntut LAD untuk tempoh lanjutan, yang mana itu adalah tidak elok bagi industri perumahan.

(6) Unit telah pun siap dan selamat untuk dihuni seperti yang disahkan oleh CFO yang dikeluarkan pada 25 Mei 2011 dan diberitahu kepada plaintif-plaintif pada 30 Mei 2011. Oleh kerana tarikh notis 16 September 2010 sebelumnya tidak sah, maka tarikh sah bagi penyerahan milikan kosong adalah tarikh apabila pengeluaran CFO oleh pihak berkuasa yang berkenaan diberitahu kepada plaintif-plaintif, iaitu 30 Mei 2011. Oleh itu, tarikh penggalan bagi pengiraan LAD berkaitan penyerahan lewat milikan kosong unit adalah 30 Mei 2011, seperti yang diputuskan sebelumnya oleh Mahkamah Tinggi.

Case(s) referred to:

Golden Quantum Acres Sdn Bhd v. SSU Management Services Sdn Bhd [2014] 10 CLJ 320 HC ***(aff)***

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

Soon Teik Development Sdn Bhd v. Liew Tuo Chee & Ors [2011] 9 CLJ 311 CA ***(aff)***

Legislation referred to:

Uniform Building By-Laws 1984, Second Schedule Form E

For the appellants - Ong Chee Kwan & Han Li Meng; M/s Christopher & Lee Ong
For the respondents - NV Sree Harry; M/s Sree Harry & Co

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: W-02-(NVCV)(W)-741-04-2014 (overruled).]

Reported by Wan Sharif Ahmad

JUDGMENT

Ramly Ali FCJ:

Introduction

[1] This is an appeal by the appellants against the decision of the Court of Appeal given on 27 October 2014 which *inter alia* allowed the respondents' appeal on the issue of the respondents' claim for liquidated ascertained damages (LAD) in respect of an apartment unit up to a cut-off date of 16 April 2014 (being the date the respondents were deemed to have taken actual vacant possession of the apartment unit).

[2] For ease of reference, we shall refer to the appellants herein as the defendants and the respondents as the plaintiffs as they were respectively referred to in the High Court.

[3] The High Court had earlier allowed the plaintiffs' claim for LAD against the first defendant up to 30 May 2011 (being the date of the notification by the first defendant to the plaintiffs of the issuance of the certificate of fitness for occupation (CFO) by the appropriate authority). On appeal by the plaintiffs on the cut-off date for the calculation of the LAD, the Court of Appeal on 27 October 2014 reversed the decision of the High

Court on that issue, and ordered that the cut-off date for the plaintiffs' claim for the LAD be extended to 16 April 2014 (being the date when the plaintiffs wrote to the first defendant indicating their intention to take possession). Dissatisfied with the said order of the Court of Appeal the defendants then appealed to this court.

[4] We heard the appeal on 21 March 2017 and allowed it with costs. We set aside the decision of the Court of Appeal and reinstated the decision of the High Court. We now give our reasons for doing so.

Background Facts

[5] The plaintiffs were joint purchasers of an apartment in a project developed by the first defendant which was known as Subang Olive Residence, Unit No. J1-K-13-1 (the unit). For that purpose a sale and purchase agreement dated 29 June 2005 was entered into by the parties (the SPA).

[6] Clause 24.1 of the SPA provides that the unit shall be completed and vacant possession shall be delivered to the plaintiffs within 36-months from the date of the SPA (ie, on or before 28 June 2008). Under cl. 24.2, if the first defendant fails to deliver vacant possession of the unit as stipulated in the SPA, the first defendant shall be liable to pay the plaintiffs LAD calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date for delivery of vacant possession until the date the plaintiffs take delivery of vacant possession of the unit.

[7] The first defendant was unable to deliver vacant possession within the stipulated period of 36 months. The unit was only completed some 2½ years later.

[8] In an attempt to deliver vacant possession, the first defendant issued a notice of delivery of vacant possession dated 16 November 2010 to the plaintiffs. However, it is not in dispute that the said notice was invalid on the ground that it was not supported by a letter of confirmation from the appropriate authority certifying that Form E as prescribed under the Second Schedule to the Uniform Building By-Laws 1984 had been duly submitted and checked and accepted by the appropriate authority, as required in cl. 25.2 of the SPA. It was also not in dispute that the first defendant only submitted the relevant Form E to the relevant authority on 13 May 2011. The CFO in respect of the unit was duly issued by the appropriate authority on 25 May 2011. The first defendant did not issue a new notice of delivery of vacant possession upon issuance of the CFO.

[9] On 30 May 2011, the first defendant notified the plaintiffs about the issuance of the CFO for the unit. On 16 April 2014, the plaintiffs wrote to the first defendant indicating their intention of taking vacant possession of the unit. However, the plaintiffs only took actual vacant possession of the unit on 20 September 2016.

[10] The plaintiffs commenced an action against the first defendant at the High Court on 26 April 2012 *inter alia* for an order that the plaintiffs be allowed to claim continuous LAD from 28 June 2008 until the date they took actual vacant possession (on 20 September 2016).

[11] The first defendant filed its counterclaim against the plaintiffs for an amount of RM105,199.76 for miscellaneous charges such as maintenance charges, sinking fund and late payment interest.

[12] On 21 March 2014, the High Court allowed the plaintiffs' claim for LAD but only up to 30 May 2011 being the date of the notification of the issuance of the CFO for the unit. The first defendant's counterclaim was dismissed. At para. 5 of the grounds of judgment, the learned judge ruled:

> 5. Tempoh pembayaran ganti rugi jumlah tertentu yang boleh dituntut oleh plaintif-plaintif, pada pandangan saya, adalah dari 28.6.2008 sehingga 30.5.2011 iaitu tarikh plaintif-plaintif dimaklumkan tentang pengeluaran Sijil Layak Menduduki (ekshibit P13), iaitu selama 1067 hari. Pada tarikh pengeluaran mengikut perkiraan dalam klausa 24.2, RM141.23 sehari X 1067 = RM150,692.41. Amaun ini adalah terakru untuk dibayar pada 30.5.2011 di mana plaintif disifatkan telah mengambil milikan kosong (sila rujuk kes Mahkamah Rayuan *Soon Teik Development Sdn Bhd v. Liew Tuo Chee & Ors* [2011] 6 MLJ 350).

[13] At para. 22 of the grounds of judgment, the learned judge stressed that "Adalah penghakiman saya bahawa milikan kosong telah disifatkan diberikan kepada plaintif pada 30 Mei 2011 iaitu tarikh plaintif dimaklumkan tentang pengeluaran sijil layak menduduki".

[14] Dissatisfied with the above decision, the plaintiffs appealed to the Court of Appeal only on the issue of the cut-off date for the calculation of LAD. The Court of Appeal allowed the plaintiffs' appeal in that their claim for continuous LAD be extended up to 16 April 2014, being the date of the plaintiffs' letter to the first defendant indicating their intention to take vacant possession of the unit.

At The Federal Court

[15] On 21 April 2015, this court granted the defendants leave to appeal on the following questions of law, namely:

(i) in cases of an invalid notice of vacant possession, when is vacant possession delivered:

  (a) the date of certificate of fitness for occupation (CFO); or

  (b) the date when the purchasers took possession of the keys to the unit; and

(ii) in cases of an invalid notice of vacant possession, can there be two different vacant possession dates in the sale and purchase agreement?

[16] In the instant case, it is not in dispute that there was delay in the completion and delivery of vacant possession of the unit to the plaintiffs. The delivery period of 36 months as stipulated in cl. 24.1 of the SPA had lapsed, and pursuant to cl. 24.2 of the SPA the first defendant as the developer was liable to pay LAD as a result of the delay.

[17] It is also not in dispute that the notice of delivery of vacant possession dated 16 November 2010 issued by the first defendant to the plaintiffs was invalid for noncompliance with the requirement in cl. 25.2 of the SPA as the first defendant had not submitted the relevant form E as prescribed in the Second Schedule to the Uniform Building By-Laws 1984 to the relevant authority. It is also not in dispute that the CFO to the unit was issued on 25 May 2011 and the plaintiffs were duly notified by the first defendant about it on 30 May 2011; and the plaintiffs only took actual vacant possession by taking the keys to the unit on 20 September 2016, after the commencement of this case at the High Court.

[18] The only issue in dispute relates to the cut-off date for the computation of the LAD to be paid by the first defendant to the plaintiffs. The question is when was vacant possession deemed delivered? Was it on the date the plaintiffs were notified of the issuance of the CFO for the unit or the date when the plaintiffs took actual possession by taking the keys to the unit?

[19] Learned counsel for the defendants contended that the cut-off date should be the date the plaintiffs were notified that the CFO had been issued; while learned counsel for the plaintiffs contended that the cut-off date was the date when they took possession of the keys to the unit on 20 September 2016.

[20] The first defendant notified the plaintiffs about the issuance of the CFO for the unit on 30 May 2011. In the said notification, the first defendant informed the plaintiffs "that all the above approvals from the authorities to enable you to occupy your property have been obtained. The approval is available for your inspection at our office. Please be reminded that you have yet to pay/settle the progressive payment and miscellaneous charges amount of RM92,312.26 as per statement enclosed. Kindly make good of the said payment soonest possible".

[21] The manner of delivery of vacant possession of the unit to the plaintiffs is governed by cl. 25 of the SPA. Under cl. 25.1, the first defendant shall let the plaintiffs into possession of the unit *inter alia* after the plaintiffs "having paid all monies payable under cl. 4 in accordance with the third schedule and all monies due under this agreement and the purchaser having performed and observed all the terms and covenants on his part under this agreement".

[22] The third schedule to the SPA deals with the schedule of payment of the purchase price. Item 3 of the schedule provides that "on the date the purchaser takes possession of the said parcel with water and electricity

supply ready for connection to the parcel", the plaintiffs as purchasers need to pay (12.5%) of the purchase price. Item 4, provides that "within 21 working days after receipt by the purchaser of the written confirmation of the vendor's submission to and acceptance by the appropriate authority of the application for subdivision of the said building", the purchasers need to pay 2.5% of the purchase price; and item 5.

[23] Clause 25.2 of the SPA reads:

> 25.2 The delivery of vacant possession by the Vendor shall be supported by:
>
> (a) a certificate signed by the Vendor's architect certifying that the said Building has been duly constructed and completed in accordance with the relevant Acts, by-laws and regulations and that all conditions imposed by the Appropriate Authority in respect of the issuance of the Certificate of Fitness for Occupation have been duly complied with; and
>
> (b) a letter of confirmation from the Appropriate Authority certifying that the Form E as prescribed under the Second Schedule to the Uniform Building By-Laws 1984 has been duly submitted by the Vendor and checked and accepted by the Appropriate Authority.

[24] Clause 25.3 of the SPA reads:

> 25.3 Such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the Parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

[25] To fulfil the requirement prescribed in cl. 25.2(a) of the SPA, a certificate of practical completion of the unit in question signed by the first defendant's architect was issued on 9 November 2010; and the CFO in respect thereof was issued by the Majlis Perbandaran Subang Jaya, as the appropriate authority, on 25 May 2011. With the issuance of both certificates, we can conclusively conclude that all conditions required for the issuance have been duly complied with. The CFO clearly certified that the said unit (apartment) in question "telah siap dibina .... mengikut pelan kelulusan No. A1 286/9/2 dan bahawa bangunan itu adalah layak untuk diduduki seperti yang diperakui oleh arkitek".

[26] In the certificate of practical completion, the architect had certified that: "... in our opinion ... the works are practically completed and the contractor has performed and completed all the necessary works specified in the contract on the day named 9 November 2010".

[27] As required by cl. 25.2(b) of the SPA, a letter of confirmation from the Majlis Perbandaran Subang Jaya as the appropriate authority dated 13 May 2011, certifying that the Form E as prescribed in the Second Schedule to the Uniform Building By-Laws 1984 had been submitted by the first defendant and checked and accepted by the Majlis, was issued.

[28] Pursuant to cl. 25.3 of the SPA, the plaintiffs have the right to occupy the unit after the CFO was issued but not before that. As required by cl. 25.1 of the SPA, in order to take vacant possession of the unit, the plaintiffs *inter alia* need to pay all monies due and payable under the SPA, the amount of which as stated in the first defendant's notification dated 30 May 2011 was RM92,312.26.

[29] According to the evidence of SD1, the general manager of the first defendant, the first defendant wanted to deliver vacant possession after the issuance of the CFO, but the plaintiffs refused to take it. The plaintiffs insisted that they were entitled to LAD and they did not need to pay the balance of the purchase price of the unit at all. The plaintiffs only took physical possession of the unit when they took the keys to the unit from the first defendant on 20 September 2016.

[30] The learned judge had made her findings that "keterangan menunjukkan bahawa plaintif mengikat penyerahan milikan kosong kepada dua syarat. Pertamanya, plaintif mahu baki bersih ganti rugi tertentu diberikan bersekali dengan milikan kosong. Keduanya, penyerahan milikan kosong mesti diiringi dengan unit tersebut dilengkapi dengan peralatan yang dikatakannya telah dijanjikan oleh defendan pertama sebagaimana yang terkandung dalam surat plaintif pertama di eks. P16 yang antara lain menyebut:

> Therefore, what LAD we have claimed so far is only an interim amount, for the final quantum of LAD can only be determined when you actually deliver Vacant Possession of the unit installed with all the items and fixtures as pledged in your letters (one dated 31.5.2005 and two dated 29.06-2005) copies enclosed.
>
> We await your instruction when we can take delivery of Vacant Possession of the unit together with the balance of LAD we are legally entitled to.

[31] After going through all the evidence in this case, we were satisfied that the first defendant as the developer was willing and ready to deliver vacant possession of the unit when the CFO was issued. All the relevant requirements for delivery of vacant possession as stipulated in cl. 25.2 of the SPA were fulfilled by the first defendant. The plaintiffs have failed to perform their part of the SPA by tendering the balance purchase price and other monies due and payable in respect of the unit, which had been clearly notified in the notification from the first defendant dated 30 May 2011. The installation of all the items and fixtures as requested in the plaintiffs' letter is something not included in the SPA. It is also not a term of the SPA that vacant possession of the unit must be delivered together with the balance of the LAD payment that the plaintiffs claimed to be entitled to. The requests were clearly unreasonable.

[32] In holding that the cut-off date for the payment of LAD by the first defendant would be the date the plaintiffs took actual vacant possession of the unit, the Court of Appeal was relying on the decision in *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618 where it was held that as the notice of delivery of vacant possession was invalid (as in the instant case), the purchasers were entitled to continue to claim LAD until they took actual possession of their apartments.

[33] With respect, we are of the view that the decision in *Sentul Raya* cannot be applied to the facts of the instant case. The factual matrix in that case is different from the factual matrix in this case. In that case, there was no CFO issued at the time the LAD claim was filed in court as the project in question had not been completed yet. Thus, the question of the cut-off date for the LAD claim was still open. However, in the instant case, the construction of the unit in question was completed and the CFO was duly issued and the plaintiffs as purchasers were duly informed about the issuance before the LAD claim was filed in court.

[34] Our view is that when the CFO to the unit was issued and its issuance notified to the plaintiffs, the plaintiffs could no longer resist vacant possession by refusing to fulfil their obligation to make payment of the balance purchase price in the manner as stipulated in the SPA and making unreasonable demands. When the CFO was issued, the unit was certified to be safe for occupation. In the circumstances, the plaintiffs are not entitled to claim for LAD until the date when they took actual vacant possession by taking the keys to the unit. This may amount to an inflated claim for LAD which is prejudicial to the first defendant. It also amounts to unjust enrichment of the plaintiffs.

[35] The plaintiffs must realise that the first defendant's obligation to deliver vacant possession of the unit to the plaintiffs is governed by cl. 25 of the SPA. The first defendant had done all that needed to be done under the SPA, ie, to deliver vacant possession of the unit which was certified to be safe for occupation. The fact that the earlier delivery notice dated 16 November 2010 issued by the first defendant to the plaintiffs was invalid does not mean that the first defendant has failed in its obligations under the SPA to deliver vacant possession.

[36] On this issue, we agree with the dictum of Nallini Pathmanathan J in *Golden Quantum Acres Sdn Bhd v. SSU Management Services Sdn Bhd* [2014] 10 CLJ 320 when Her Ladyship said:

> It does not follow from the foregoing that the plaintiffs are entitled to choose a date which they deem fit to 'take' or 'claim' vacant possession. To allow such a construction of cls. 26 and 27 would give rise to a vastly exaggerated claim, as it would then theoretically be open to the plaintiffs to take possession some ten years after the practical completion of the building and make claim for LAD.

[37] By such delay in exercising their right to take delivery of vacant possession, the plaintiffs are taking advantage of a more attractive benefit set out in the artificial formula for computation of LAD for late delivery of vacant possession.

[38] We also agree with the Court of Appeal in *Soon Teik Development Sdn Bhd v. Liew Tuo Chee & Ors* [2011] 9 CLJ 311; [2011] 6 MLJ 350, in affirming the High Court decision to the effect that "in the absence of a proper certificate of practical completion pursuant to cl. 25 of the agreement being issued, the shop lots must be presumed to have not been completed until the issuance of the certificate of fitness for occupation (CF) or anytime before". In other words, the shop lots in that case were deemed or presumed to be completed upon the issuance of the CFO.

[39] To allow the plaintiffs to take their own "sweet time" in taking delivery of vacant possession of the unit consequently seeking to enjoy a higher amount of LAD (despite the issuance of CFO being notified to them), is clearly unjustified and unfair to the first defendant as the developer. The first defendant may be prejudiced and suffer damages for loss and damage to the unit and/or to fixtures and fittings therein if the plaintiffs took too long to take vacant possession; more so if the plaintiffs are allowed to claim LAD for the extended period. This may not be good for the housing industry. The imposition of LAD is not to enrich the plaintiffs by refusing or delaying to take delivery of vacant possession even though the unit was certified to be safe for occupation and they were duly notified about that.

Conclusion

[40] For the above reasons and based on the facts and circumstances of the instant case, it was our finding that the unit in question had been completed and was safe for occupation as certified in the CFO which was issued on 25 May 2011 and notified to the plaintiffs on 30 May 2011. As the earlier notification by the first defendant dated 16 September 2010 was invalid, we were of the view that the effective date of delivery of vacant possession in this case was the date when the issuance of the CFO by the appropriate authority was notified to the plaintiffs which was on 30 May 2011. Therefore, the cut-off date for calculation of LAD relating to the late delivery of vacant possession of the unit was 30 May 2011, as earlier decided by the High Court.

[41] We therefore allowed the appeal with costs. We set aside the decision of the Court of Appeal and reinstated the decision of the High Court.

[42] In the circumstances of this case, we found it unnecessary to answer the two questions posed in this appeal.